

**ANNUAL REPORT
OF THE
ENVIRONMENTAL QUALITY
SERVICE COUNCIL**



**Indiana Legislative Services Agency
200 W. Washington Street, Suite 301
Indianapolis, Indiana 46204**

November, 2002

INDIANA LEGISLATIVE COUNCIL

2002

Speaker John Gregg

Chairman

Sandborn

Senator Robert Garton

Vice-Chairman

Columbus

Representative Brian Bosma

Indianapolis

Senator Richard Young

Milltown

Representative Mark Kruzan

Bloomington

Senator Harold Wheeler

Larwill

Representative Dale Grubb

Covington

Senator Joseph Harrison

Attica

Representative William Cochran

New Albany

Senator Patricia Miller

Indianapolis

Representative Charlie Brown

Gary

Senator Thomas Wyss

Fort Wayne

Representative Kathy Richardson

Noblesville

Senator James Lewis

Charlestown

Representative Richard Mangus

Lakeville

Senator Earline Rogers

Gary

Philip J. Sachtleben
Executive Director
Legislative Services Agency

ENVIRONMENTAL QUALITY SERVICE COUNCIL
Membership Roster

Representatives

Jonathan Weinzapfel, Chairperson
Evansville

Ron Herrell
Kokomo

Richard Mangus
Lakeville

David Wolkins
Winona Lake

Gary Reding
Greensburg

Mayor William Goffinet
Tell City

Art Smith, Jr.
Merrillville

William Hayden
Bloomington

Lori F. Kaplan
Indianapolis

Senators

Beverly Gard
Greenfield

Kent Adams
Warsaw

Vi Simpson
Bloomington

Lindel Hume
Princeton

Randy Edgemon
Greenwood

Mayor James Trobaugh
Kokomo

Ellen Tobias
Rockville

Kerry Michael Manders
Indianapolis

Sandra Miles
Indianapolis

Lay Members

Staff

Robert Bond
Attorney for the Commission

Bernadette Bartlett
Fiscal Analyst for the Commission

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Committee can be accessed from the General Assembly Homepage at <http://www.state.in.us/legislative/>.

I. STATUTORY AND LEGISLATIVE COUNCIL DIRECTIVES

The Indiana General Assembly enacted P.L.248-2001 (SEA 121) directing the Environmental Quality Service Council (EQSC) to do the following:

- (1) Advise the Commissioner of the Department of Environmental Management (IDEM) on policy issues decided upon by the EQSC.
- (2) Review the mission and goals of IDEM and evaluate the implementation of the mission.
- (3) Serve as a council of the General Assembly to evaluate:
 - (A) resources and structural capabilities of IDEM to meet IDEM's priorities; and
 - (B) program requirements and resource requirements for IDEM.
- (4) Serve as a forum for citizens, the regulated community, and legislators to discuss broad policy directions.
- (5) Submit a final report to the Legislative Council that contains:
 - (A) an outline of activities of the EQSC;
 - (B) recommendations for any IDEM action; and
 - (C) recommendations for any legislative action.

The Legislative Council assigned to the EQSC the additional responsibility of studying the following:

- (1) State policies and rules on wetlands (SB 141-2002).
- (2) Vehicle emissions testing in Floyd and Clark Counties
- (3) Vehicle emissions testing in Lake and Porter Counties

II. INTRODUCTION AND REASONS FOR STUDY

The activities of the EQSC in 2002 were conducted to discharge the EQSC's various responsibilities under P.L. 248-2002 (SEA 121) and other acts imposing responsibilities on the EQSC.

III. SUMMARY OF WORK PROGRAM

The EQSC met five times on the following dates and at the following locations:

1. August 8, 2002	State House, Room 233 200 W. Washington St. Indianapolis, Indiana	Wetlands and 2002 agenda
2. September 5, 2002	State House, Room 130 200 W. Washington St. Indianapolis, Indiana	Storm water rules, permit fees, hazardous air pollutant (HAP) rule
3. September 12, 2002	State House, Room 404 200 W. Washington St. Indianapolis, Indiana	Vehicle emissions testing, utility smart metering, wetlands
4. September 26, 2002	State House, Room 233 200 W. Washington St. Indianapolis, Indiana	SRF program, LaGrange County sewer billing, HAP, wetlands, vehicle emissions testing, septic systems
5. October 24, 2002	Training Center, Room 5 402 W. Washington St. Indianapolis, Indiana	Wetlands, water infrastructure financing, HAP, Kokomo superfund site issues

IV. SUMMARY OF TESTIMONY

First Meeting - August 8, 2002

Wetlands. Bill Beranek, Indiana Environmental Institute, reported on wetlands issues. He described the conflicting interests concerning wetlands on private lands and suggested that the EQSC should consider a "middle ground" position for development of an integrated state wetland strategy. The goal would be to strike a balance between preserving individual property rights and defending a natural resource that the government protects as a public trust or promotes as a public good. He outlined certain principles to be incorporated into such a strategy concerning the preservation and restoration of wetlands, preservation of wetlands functions, overall increase in number and acreage of wetlands, coordination and predictability of wetlands policy, wetlands mitigation, and inventory. He also outlined potential components of wetlands policy concerning wetlands categorization, long term goals and objectives, specific wetland quality evaluation, voluntary restoration, maintenance, state agency responsibilities, statutory and regulatory authority, and conflicting policy areas.

Lori Kaplan, Commissioner, IDEM, reported on IDEM's Wetland Information Packet, which includes background information on Indiana's wetlands, regulatory authorities, recent efforts to coordinate federal and state responsibilities, wetlands statistics, a summary of state and federal regulatory programs, a report from April, 2000, of the Waterways Permit Coordination Workgroup, a subcommittee report of that workgroup, information on mitigation banking, and wetlands maps.

Jim Ray, Indiana Department of Natural Resources (DNR), reported on the DNR wetlands conservation plan. The plan covers the status of wetlands, and wetlands goals, principles, and priorities. The plan also describes the Hoosier Wetlands Conservation Initiative, which represents a strategic approach to conserving wetlands resources.

Subcommittee and Workgroups. Rep. Weinzapfel announced the formation of the following:

A. Water Infrastructure Finance Subcommittee

Objectives: Examine the feasibility and related benefits of establishing an environmental finance authority, review the state infrastructure needs, and consider alternative funding sources to create a dedicated source of funding.

Membership:

Rep. Weinzapfel, Chairperson; Mayor Bill Goffinet, Vice Chairperson; Randy Edgemon; Tom Neltner; Matt Rueff; Jim Soper

B. Wetlands Quality Workgroup

Objectives: Consider and list policy options and ramifications for categorizing and measuring the quality of a wetland according to various evaluation factors.

Membership: Sen. Hume, Chairperson; Keith Guthrie; Randy Lewis; Gary Reding; John Shuey

C. Wetlands Restoration Incentives Workgroup

Objectives: Consider and list policy options and ramifications for creating incentives to promote the restoration of wetlands including those of temporary, limited duration and those which would fall within state or federal jurisdictional protection.

Membership: Rep. Wolkins, Chairperson; Miriam Dant; Bill Hayden; Rep. Mangus; Philip McCloud; Gary Reding; Mike Sandifer; Ellen Tobias

D. Wetlands Statutory Authority Workgroup

Objectives: Consider and list the policy options and ramifications for determining the extent of statutory authority to be granted to the state over various wetlands.

Membership: Sen. Gard, Chairperson; Roxanna Hanford; Mary McConnell; Mark Thornburg;

John Ulmer

Second Meeting - September 5, 2002

IDEM Funding Issues and Fees. Lori Kaplan reported on funding issues concerning waste water, the solid and hazardous waste permit program, safe drinking water, land cleanup programs, and solid waste recycling grants. She also reported on fees for the NPDES permit program, solid waste permit program, hazardous waste permit program, federal Safe Drinking Water Act program, and federal storm water program. Information was provided on the FY 2001-2003 IDEM budget, the FY 2003-2005 IDEM budget under consideration, permit fee history, and proposed fee changes.

Patrick Bennett, Indiana Manufacturers Association, presented the results of the association's IDEM fee increase survey of its membership. Jim Williams, American Waterworks Association, commented on his association's views on IDEM fee increases.

Storm Water. Lori Gates and Tim Method, both of IDEM, reported on storm water. They detailed potential storm water pollutants, federal requirements, and the state storm water program. The state program includes consideration of rules concerning storm water discharges associated with construction activity (Rule 5), industrial activity (Rule 6), and municipal activity (Rule 13). Storm water rulemaking goals and policy issues were outlined.

Rick Wajda, Indiana Builders Association, and Bill Pedtke, Brad Sterchi, and John Elpers of the Southwest Indiana Builders Association expressed concerns with respect to the potential impact of Rule 5.

Tonya Galbraith, Indiana Association of Cities and Towns, commented on her association's views of the potential impact of Rule 13 and plan to respond to the challenges of NPDES Phase II.

Hazardous Air Pollutants. Janet McCabe, IDEM, reported on IDEM's hazardous air pollutant rule and five-year strategy. The five-year strategy is currently under development in cooperation with the Indiana State Department of Health (ISDH) pursuant to P.L.166-2002 (SEA 259), and is expected to be completed by October 31, 2002. IDEM and ISDH are working with an emission reporting workgroup in the development of the strategy.

Third Meeting - September 12, 2002

Vehicle Emissions Testing. Tim Method, reported on vehicle emissions testing required under the federal Clean Air Act. The Clean Air Car Check program requires biennial emissions tests in Clark,

Floyd, Lake, and Porter Counties. Mr. Method discussed the nature of the tests, vehicle exemptions, program funding, air quality benefits, and the Indiana NOx rule. He also addressed possible needs for further air pollutant controls with respect to certain types of businesses and industries, possible further steps at the state level to improve air pollution control, and current issues in the Clean Air Car Check program.

Utility Smart Metering. Bernard Hasten, Speedread Technologies, and Miriam Dant, Baker & Daniels, reported on the benefits of automated utility meter reading. The water conservation benefits resulting from instant leak detection, increased consumer awareness, and water usage analysis were documented by case studies.

Wetlands. The chairpersons of the wetlands workgroups gave brief status reports, and Bill Beranek provided a status report on the workgroups.

Fourth Meeting - September 26, 2002

Vehicle Emissions Testing. Rep. James Bottorff and Rep. William Cochran were in attendance for discussion of vehicle emissions testing in Clark and Floyd Counties. Janet McCabe responded to questions from Rep. Bottorff and Rep. Cochran concerning possible elimination of or adjustments to the testing programs in Clark and Floyd Counties, exemption from testing of certain vehicles, the cost and efficiency of the testing methods used, and the terms of the testing companies' contracts. Testing programs are one of several factors considered in achieving air quality standards, and other factors could theoretically eliminate the need for testing. However, mobile emissions are the most significant contributors to air pollution in these counties. Among factors considered is the closing of industrial facilities, such as the DuPont facility in Louisville, Kentucky. Ms. McCabe indicated that IDEM will review the testing programs to determine whether any changes are warranted.

Campground Sewer Billing. Rep. Dale Sturtz introduced Paul Giesecking, owner of Indian Lakes Campground in Wolcottville, LaGrange County, who discussed an issue concerning billing by the LaGrange Sewer District for sewer services to the campground. Mr. Giesecking is trying to convince the sewer district board to change the annual flat fee for services, which he considers to be excessive, to a more reasonable fee based on measured usage of services. Supporting testimony was offered by owners of campgrounds in similar circumstances. Means of addressing the issue were discussed.

Allen County Septic System Issues. Rep. Ben GiaQuinta introduced Sandra Flum, Allen County Board of Commissioners, who initiated discussion concerning the status of efforts under P.L.172-2002 (SEA 461) to obtain a general permit from the U.S. Environmental Protection Agency (EPA) concerning residential discharging septic systems in Allen County. Meetings with IDEM have occurred, and progress has been made. Loren Robertson, Allen County Department of Health, indicated that a county onsite waste management district will be created by the end of the year, but that the issuance of the permit must await IDEM rulemaking action, which will take approximately one year. Tim Method addressed the rulemaking requirement, and the possible

consideration of emergency rulemaking. Representative Weinzapfel urged IDEM to explore all possible means of expediting the rulemaking process.

Water Infrastructure Needs. Tonya Galbraith, introduced Dr. Greg Lindsey, Indiana University Center for Urban Policy and the Environment, to discuss drinking water and waste water infrastructure needs. Dr. Lindsey is seeking to generate infrastructure needs estimates more complete than those that have resulted from IDEM community surveys. Bruno Pigott, IDEM, discussed the drinking water and waste water infrastructure funding options available through the state revolving loan fund programs.

Hazardous Air Pollutants. Ms. McCabe reported on IDEM's progress in developing a five year hazardous air pollutant strategy as described above under the EQSC meeting of September 5. Discussion ensued concerning the method of determination of the air pollutants to be monitored and monitoring costs. A final report to the EQSC on this subject is scheduled for the EQSC's last meeting on October 24.

Wetlands. The chairpersons of the wetlands workgroups gave brief status reports, and Bill Beranek provided a status report on the workgroups.

Fifth Meeting - October 24, 2002

Kokomo Continental Steel Superfund Site. Pat Likins, IDEM program manager for the site, summarized the history of the clean-up, including IDEM's and the EPA's past and expected future involvement, factors considered in determining appropriate disposal methods, cost considerations, and implications for the City of Kokomo. Rep. Herrell expressed his belief that firm disposal cost data should be obtained before a disposal alternative is finally selected. Mayor Trobaugh expressed his support for the Corrective Action Management Unit alternative, and his concern about negative consequences resulting from further delay. Rep. Herrell proposed adoption of a recommendation to require IDEM to issue a request for proposals to seek competitive bids to determine the actual cost of off-site disposal. The proposal was defeated by voice vote.

Hazardous Air Pollutants (HAP's). Ms. McCabe discussed progress made toward development of a five-year HAP strategy as directed by P.L. 166-2002 (SEA 259). IDEM will have further consultations with stakeholders, and expects to propose a revised HAP rule to be considered by the Air Pollution Control Board for possible adoption in 2003. By voice vote, the EQSC adopted the following recommendation: "The EQSC should review the revised HAP rule before its adoption in 2003."

Water Infrastructure Finance Subcommittee. The subcommittee made the following recommendations to the EQSC:

Recommendation #1: "Long term SRF environmental programs needs and related utility infrastructure needs should be handled by a new entity. In the short term, SRF procedures should be streamlined and better coordinated."

Recommendation #2: "Storm water and wastewater infrastructure needs are projected to be \$8-16 billion. Current requirements should not and cannot be borne strictly by ratepayers. State and federal contributions are required to meet standards, protect public health, and ensure success of our communities. Indiana needs to leverage federal funding and find a permanent source of state funding."

By voice vote, the EQSC adopted the recommendations with amendments, inserting "or existing single" before "entity" in the first sentence of Recommendation #1, and deleting "needs to" and inserting "should" in the fourth sentence of Recommendation #2.

Wetlands Quality Workgroup. The workgroup submitted its report to the EQSC, which included the findings of the workgroup. By voice vote, the EQSC adopted the report as amended by redesignating Appendix A as paragraph III.

Wetlands Restoration Incentives Workgroup. The workgroup submitted its report to the EQSC, which included the recommendations of the workgroup. By voice vote, the EQSC adopted the report, and adopted the workgroup recommendations as the recommendations of the EQSC.

Wetlands Statutory Authority Workgroup. The workgroup submitted its report to the EQSC, which included the recommendations of the workgroup. By voice vote, the EQSC adopted the report, and adopted the workgroup recommendations the recommendations of the EQSC.

LaGrange Sewer District Campground Fees. By voice vote, the EQSC adopted the following recommendation: "Fees in the LaGrange Sewer District for sewer services to campgrounds should be based on measured usage of services."

Allen County Septic System Issues. By voice vote, the EQSC adopted the following recommendation: "IDEM should work with the EPA to expedite the approval of a general permit concerning residential discharging septic systems in Allen County pursuant to P.L.172-2002 (SEA 461)."

Vehicle Emissions Testing: By voice vote, the EQSC adopted the following recommendation: "IDEM should work with Clark and Floyd Counties to adopt the lowest level of vehicle emissions testing required to meet clean air standards and work with local communities to find alternatives to vehicle emissions testing."

EQSC Approval of Final Report. The EQSC discussed and approved this Final Report by voice vote of a majority of members appointed to serve on the EQSC.

V. EQSC RECOMMENDATIONS

The EQSC made the following recommendations:

1. Water Infrastructure Finance Subcommittee.

Recommendation #1: "Long term SRF environmental programs needs and related utility infrastructure needs should be handled by a new or existing single entity. In the short term, SRF procedures should be streamlined and better coordinated."

Recommendation #2: "Storm water and wastewater infrastructure needs are projected to be \$8-16 billion. Current requirements should not and cannot be borne strictly by ratepayers. State and federal contributions are required to meet standards, protect public health, and ensure success of our communities. Indiana should leverage federal funding and find a permanent source of state funding."

2. Wetlands Quality Workgroup. The EQSC adopts the report and the findings of the workgroup as set forth in Attachment 1.

3. Wetlands Restoration Incentives Workgroup. The EQSC adopts the report and the recommendations of the workgroup as set forth in Attachment 2.

4. Wetlands Statutory Authority Workgroup. The EQSC adopts the report and the recommendations of the workgroup as set forth in Attachment 3.

5. LaGrange Sewer District Campground Fees. Fees in the LaGrange Sewer District for sewer services to campgrounds should be based on measured usage of services.

6. Allen County Septic System Issues. IDEM should work with the EPA to expedite the approval of a general permit concerning residential discharging septic systems in Allen County pursuant to P.L.172-2002 (SEA 461).

7. Vehicle Emissions Testing. IDEM should work with Clark and Floyd Counties to adopt the lowest level of vehicle emissions testing required to meet clean air standards and work with local communities to find alternatives to vehicle emissions testing.

8. Hazardous Air Pollutants. The EQSC should review the revised hazardous air pollutants rule before its adoption in 2003.

WITNESS LIST

Patrick Bennett, Indiana Manufacturers Association
Bill Beranek, Indiana Environmental Institute
Rep. James Bottorff
Rep. William Cochran
Miriam Dant, Baker & Daniels
John Elpers, Southwest Indiana Builders Association
Sandra Flum, Allen County Board of Commissioners
Tonya Galbtraith, Indiana Association of Cities and Towns
Lori Gates, IDEM
Rep. Benjamin GiaQuinta
Paul Giesecking, Indian Lakes Campground
Bernard Hasten, Speedread Technologies
Lori Kaplan, IDEM Commissioner
Pat Likins, IDEM
Dr. Greg Lindsey, Indiana University Center for Urban Policy and the Environment
Janet McCabe, IDEM
Tim Method, IDEM Deputy Commissioner
Bill Pedtke, Southwest Indiana Builders Association
Bruno Pigott, IDEM
Jim Ray, DNR
Loren Robertson, Allen County Department of Health
Brad Sterchi, Southwest Indiana Builders Association
Rep. Dale Sturtz
Jim Williams, American Waterworks Association
Rick Wajda, Indiana Builders Association

ATTACHMENT 1

Report of the EQSC Wetlands Quality Workgroup

Senator Lindel Hume, Chairperson

October 4, 2002

I. Purpose of EQSC Wetlands Quality Workgroup

In order to evaluate the implications and appropriateness of a state policy of net gain of high quality wetlands, it is necessary to have a common understanding of the key factors to evaluate the wetland and then a common understanding of the ways the factors could be distinguished for different policy purposes.

Policy-makers need to be able to say, without extensive expert study and with good agreement, which wetland aspects should be considered for a given policy purpose. For each aspect, there should be agreement on how to differentiate quality for the policy purpose. A policy that asks where to focus state wetland restoration resources for a particular policy reason would favor those decisions that result in a net gain in high quality wetland. A policy that asks where to focus state wetland mitigations for a particular policy reason would favor those decisions that result in a net gain in high quality wetland.

Especially for state wetland policy on private lands, the terminology of the quality discussion must be understandable to affected landowners, neighbors, and the general citizenry.

The subcommittee evaluated the possibility of creating a list of terms commonly used in public policy discussions about the advantages and disadvantages of wetlands. After much discussion, it was determined that there is a set of terms that could be used for the technically trained and the lay people to speak constructively to craft policies that could favor restoration and maintenance of higher quality wetlands. This set of terms would evolve, but the workgroup offers examples of general ways to differentiate quality for various aspects. See Appendix A.

II. Findings

1. A certain wetland may perform a given wetland function better than another. A certain wetland may be in a more hydrologically and vegetatively sustainable situation compared to another.
2. If the state is to pursue a policy of net gain of high quality wetlands through restoration incentives, resource management policies, and compensatory mitigation policies, it is feasible for the state to consider relative quality of each of the many functions a wetland performs.
3. There is no universal scheme to compare the overall quality of two specific wetlands.

III. Matrix - Proposed Indiana Wetland Quality Assessment Terminology


On the following chart are examples of terms to be used for policy discussions for a rational state

strategy to achieve a net gain of high quality wetlands through appropriately directed resource management of public lands, restoration incentives for private lands, and compensatory mitigation for private lands. The list is to be used in discussing policies for common wetlands in Indiana. It is not to be used for policy about two categories of wetlands: 1) those that themselves are undisturbed examples of rare and ecologically important wetlands (those through future rulemaking would be protected specially); and 2) those on heavily disturbed land managed for other purposes (those through future law making would be declared not in the state's public interest to protect as wetlands).

The list is not to be used to classify a given wetland as better or worse than another. That judgment depends on a particular policy purpose. The difference of how aspects are selected as important and how quality is evaluated for a given aspect will depend on the policy. For a given policy purpose, what is described here as lower on the line may be the desirable attribute. "Lower" is not inherently bad, nor is "higher" inherently good. For the same reason, no list such as this should be used for regulatory purposes or for law unless the aspects and quality differentiation are evaluated for the policy purpose of the particular regulation or law.

The list is not comprehensive. There could be many other important different habitats (such as for fish or furbearing animals), historical values to a particular place that is a wetland, and commercial uses for wetlands (such as mint and cranberry lands, peat mining, and forest products). The debate about state lands that are wetlands, or are in public interest to become wetlands, must include all aspects and all ways that quality of the aspects are differentiated.

These are simply important terms that could occur in the state wetland policy debate.

Aspect	Examples of Possible Range of Quality Distinctions for Possible Wetland Aspects		
	<div>Higher</div> <div></div>		
Vegetation			
a. Diversity	High diversity and evenness with healthy plants		Primarily monoculture or unhealthy or no vegetation
b. Invasives	Invasives rare		Invasives extensive
c. Imperiled species (endangered/threatened)	Imperiled wetland species present		No imperiled species present
Wildlife Habitat			
a. Imperiled species (endangered/threatened)	Resident, wetlands imperiled species present	Resident, terrestrial imperiled species present	No imperiled species present

b. Resident population	Uncommon non-mobile (e.g., mussels)	Migratory species (e.g., waterfowl)	Nuisance species (e.g., geese) species and health risks (e.g., mosquitoes)
c. Amphibian	Seasonally dry		Only permanent standing water with fish
d. Reproduction	Unique habitat for aquatic species; scarce in area	Common habitat; not scarce in area	Little reproductive habitat
e. Migratory bird	Large areas, wet in appropriate seasons; corridors; buffers		small areas; inappropriate hydrology
f. Native Species	Total ecosystem native; adequate land buffer	Isolated from ready invasion	Partial native species; in developed land with inadequate land buffer
Habitat Alteration			
a. Alteration extent	None or little		High
b. Habitat recovery	No alteration or recovered		Recently disturbed
Hydrology Function			
a. Source water	Groundwater and/or other natural surface sources		Man-made source (e.g., retention ponds, irrigation and failing septic system)
b. GW recharge	High GW recharge (e.g., karst geology)		Low GW recharge (e.g., clay soils)
c. Storage/retention	High storage/retention and release		Low storage/retention
Sustainable Hydrology			
a. Source of Inundation	Reliable/natural	Reliable/man-managed	Unreliable Source
b. Connectivity (degree to which part of larger water system)	High		Low
Soil Characteristic			
a. Development	High (e.g., high organic material)		Low (e.g., primarily mineral)

b. Soil horizon	Deep	Shallow
-----------------	------	---------

Buffer Land Impacts

a. Buffer alterations	None or little (e.g., mature forest, prairie)	Recovering (e.g., old field)	Disturbed/modified (e.g., agricultural, industrial or urban)
b. Buffering	High filtration and erosion control	Mod. filtration and erosion control	Low filtration and erosion control

Environmental Quality Improvement

a. Water Quality	Effectively filters large flows of low-quality incoming water (e.g. sediments; phosphate; E.coli)	Causes little change to effluent water (water already clean, wetland not filter or negligible flow through)
b. Recreational	Good attributes for hunting, fishing, hiking, or education	Poor attributes for hunting, fishing, hiking, or education

Maintenance Costs	Exists with high quality aspects with minimal human maintenance	Exists with high quality aspects only with constant high human intervention
--------------------------	-----------------------------------------------------------------	-----------------------------------------------------------------------------

Care should be used in distinguishing quality between man-made restoration and natural in that a man-made could be superior to a natural remnant wetland for certain wetland functions. Natural may be a positive quality indicator when hydrology is proven sustainable over time at the location. Maintenance by humans may be critical for certain important wetland values.

The size of a wetland is a valid quality measure for several wetland functions, depending on the aspect and on the state policy under consideration. The amount of high quality wetland by acreage and number in Indiana is an aspect for state policy where more is generally better. Having more locations where important functions that can be served best by wetlands are being served by wetlands is generally better.

These terms are written primarily for existing wetlands; a similar chart is needed for quality of potential restoration sites.

ATTACHMENT 2
Report of the EQSC Wetlands Restoration Incentives Workgroup
Representative David Wolkins, Chairperson
October 10, 2002

I. Purpose of Workgroup

The purpose of the workgroup was to explore the adequacy of incentives in Indiana to encourage voluntary restoration of high quality wetlands.

There were two questions:

1. Is the current set of federal, state, local, and private incentives available to landowners to restore wetlands adequate?
2. Are there currently disincentives that could be lessened by state policy?

II. Observations

1. Many programs exist that restore or fund the restoration of wetlands, in particular circumstances for particular purposes of the subsidizing organization. Program managers and landowners are often unaware of the conditions and benefits of all programs.
2. One mechanism for wetland restoration is for a federal, state, or private entity to purchase the property and restore it.
3. Another mechanism is for financial and technical assistance with or without condition of a landowner easement for ten years, thirty years, or permanently.
4. The Wetlands Reserve Program of the US Department of Agriculture is one of largest programs for subsidizing wetland restoration on private lands. For marginal prior-converted agriculture land, the incentive program to restore wetlands by federal farm subsidies has restored between 25,000 and 30,000 acres in Indiana in recent years and, with the new Farm Bill, will be capable of restoring 5000 acres per year for the foreseeable future to those willing to sell agriculture rights.
5. For landowners not wanting to enter permanent easement programs, one serious disincentive to voluntary restoration is that the private land restored to the wetland condition becomes regulated by the federal or state government in a manner to penalize the reuse of the land in a dry land state.
6. A disincentive to the neighbors of landowners who sell land to public entities or nonprofit entities, or who themselves take a tax break for wetlands on private lands, is the loss of tax revenues for critical fixed expenses to the county.

III. Recommendations

1. Establish a category of non-federal jurisdictional wetlands that are registered with the state as not-a-wetland, but are voluntarily restored independent of a regulatory program and without government subsidies. Such a wetland would not be a state regulated wetland until it is used as compensatory mitigation, is entered into a regulatory program, or is declared by the property owner to be a state regulated wetland. Such a wetland could be destroyed by the property owner without regulatory requirements protecting the inherent aspects of the wetland or the nation's interest in no net loss.
2. The state should establish a written agreement with the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency for special regulatory consideration for wetlands that are intentionally restored on a property outside of a regulatory program. The agreement should allow the destruction of such a wetland without regulatory requirements protecting the inherent aspects of the wetland or the nation's interest in no net loss.
3. The state should develop an Up-front Mitigation Banking Program (UMBP) outside current federal and state restoration programs and in addition to the federally-approved Wetland Mitigation Bank. The UMBP would help assure that filled wetlands are adequately mitigated. The UMBP would not allow pre-certified credits, which would remove a substantial amount of the regulatory burden associated with conventional mitigation banks. A simplified system would encourage the development of mitigation banks and lessen the regulatory burden on both the regulated community and the regulated industry while assuring no net loss. (See Proposal in Appendix A.)
4. The appropriate state agency should establish a wetland oversight committee of external stakeholders and government agencies to review consistency of decision-making and quality of restorations of the UMBP.
5. The state should develop a policy for accidental reappearance or appearance of wetlands on private property such that the owner is encouraged to preserve the wetland without being penalized by losing the complete range of land use choices that was available prior to the appearance.

Wetlands Restoration Incentives Workgroup
Appendix A: Proposal for Up-front Mitigation Banking Program

The following proposal is a simplified mitigation banking program intended to assure there is no net loss of wetlands in Indiana, satisfying the concerns of all stakeholders.

BACKGROUND:

There are currently two methods for compensatory mitigation of wetlands:

1. Mitigation of the property at the time of the permit; and
2. Purchase of a credit from a Wetland Mitigation Bank (WMB)

In general, most concur that recreation or reestablishment of a wetland carries some risk and that even with best intentions some wetlands restored for mitigation purposes do not perform at adequate levels.

Compensatory mitigation initiated at the time the existing wetland is filled creates the potential for a net loss of wetlands should the mitigation site fail to perform. That WMB's can distribute an agreed upon number of wetland credits at the inception of the bank also leads to a potential loss should the bank not perform adequately.

Subsequently, as a result of the potential failure and loss of wetlands, regulatory requirements are imposed on WMB's, such as: bonds, insurance, annual performance expectations, detailed annual reports, etc. The burden is substantial enough to discourage WMB's, forcing even more individual compensatory mitigation projects.

Neither the regulated community nor the environmental community is pleased with the outcomes. The regulated community has little certainty in the process and is often forced into subjective, expensive, and time consuming individual compensatory mitigation. The environmental community is not pleased because the wetland that is being built today is for a wetland that has already been destroyed, and questions arise as to when, if ever, the functions of the new wetland will replace the functions of the filled wetland. Therefore, in order to appease the majority of each group's concerns, the following goals are established.

GOALS:

1. Provide a process that assures impaired wetlands will be adequately replaced.
2. Complement, or at least do not impair, economic development.
3. Implement a simple plan with minimum regulatory burden.
4. Provide the least cost option to achieve the desired outcome.
5. Provide a degree of certainty to all parties.

RECOMMENDED SOLUTION:

To accomplish the listed goals, the following proposal is set forth: the creation of an Upfront Mitigation Banking Program” (UMBP). The operation of the banking program is detailed below.

DEVELOPING WETLANDS FOR THE UMBP:

A wetland developer, farmer, or other property owner would provide a letter of intent to the appropriate agency stating the intent to develop acreage for the UMBP.

The wetland developer would provide the minimum necessary documentation to:

1. Identify the property boundaries.
2. Identify the acreage.
3. Provide assurance that the property is not currently designated as a wetland.
4. Identify what type of wetland the applicant plans to develop.

The wetland developer is under no other future obligation in regard to actual completion or rate of progress towards completion of the wetland. The wetland developer may elect to aggressively complete the wetland or proceed at a rate that facilitates natural succession and obtaining an understanding of the site hydrology. The wetland developer would be obligated to provide a brief annual report on the progress of the mitigation bank. This not a complicated technical document. It is a one page document that describes in general terms what occurred during the year.

The appropriate agency (likely the registration oversight agency) will make available simple to use wetland restoration guidelines. This may require coordination among various agencies of the state, the federal government, or both to insure achievement of minimum quality standards.

When the wetland developer believes the site meets the U.S. Army Corps of Engineers’ definition as a wetland and any standards established by the state, the wetland developer will initiate a wetland delineation by a qualified professional to confirm. The wetland developer will then provide a notice of intent to the agency to activate the site into the UMBP. The appropriate agency will then inspect the site to confirm that it is in fact a viable wetland. Following confirmation, the mitigation bank will be available as compensatory wetland replacement for wetlands. Once a wetland credit is utilized from the UMBP, the wetland will become a regulated wetland and be afforded the same protections as an existing wetland.

USERS OF THE BANK:

Once the appropriate agency determines that disturbing the wetland cannot be avoided and the development may proceed, the “applicant” has three options: (1) to submit and have approved their own compensatory mitigation site; (2) to identify and purchase approved wetland credits at market price from the UMPB; or (3) to purchase credits from an existing wetland mitigation bank program at market price.

If the applicant elects to purchase wetland credits from the already viable UMBP, the applicant will likely be able to receive an expedited Section 404 approval, because no net loss can be immediately assured. The applicant will still be required to obtain a Section 401 Water Quality Certification for “Jurisdictional” wetlands to assure the project will not result in discharges that exceed water quality standards.

ON / OFF RAMPS:

To ensure an efficient and successful program, the applicants of a UMBP need both flexibility and predictability.

The maximum flexibility would enable the UMBP sponsor to activate the UMBP’s credits for sale and then later remove them from the program provided no credits were utilized from the site. This option could be available provided no government funds were used. The use of government funds would create permanent land restrictions or obligations. It may also be advantageous to allow enrollment into a UMBP concurrently with limited time federal/state easement contracts. This would provide additional encouragement for the development of the UMBP and easement program. Subsequently, should credits ultimately be utilized, the area would become a protected wetland.

A policy discussion needs to ensue on standards for UMBPs. If good quality wetlands are the goal, then minimum standards need to be developed.

Predictability of the wetland bank market is also critical. It will be essential for UMBP developers to announce enrollment intent at the onset of the bank development and a registration fee may also be applicable.

Unfettered ability to post-enroll newly developed voluntary wetlands into the UMBP will likely discourage entrepreneurs and other entities from creating banks. This process takes away all predictability on the future value of a bank. In a normal business environment, an entrepreneur will evaluate the market need and invest based on the belief that a profit can be derived. From this point, normal market factors influence the outcome. To expect someone to invest the time and resources into developing a bank with absolutely no assurances of any future value may be more than the process can bear. This is somewhat akin to the successful SO₂ trading program for power plants. Companies invest in over-controlling emissions believing the credits will have some degree of value. This assumption is based on their market analysis of future demand and a promise by the government to not make available additional credits. Future value of the credits may be higher or lower than expected, but generally falls within a predictable curve (risk). No other credits are allowed into the system, thereby protecting the value of the credits. If other non-registered credits (of an unlimited or unknown amount) were allowed into the system at a later date, the companies could not justify the risk of investing in infrastructure to over-control emissions and the system would fail.

GOALS ACHIEVED AND ADDITIONAL BENEFITS:

The UMBP will assure wetland mitigation success up-front, alleviating the no net loss concerns.

It is assured that the quality of the replacement wetlands will replace the functions of the impaired wetlands.

The wetland developer or developers of the UMBP are the only persons at risk, and theirs is a voluntary risk. Should they fail to deliver a viable wetland, the wetland is not eligible for the program, and no harm to the environment has occurred. The wetland developer shoulders the full responsibility for the success of the wetlands, but because of the reduced regulatory burden, entities will be much more willing to take the risk.

This market-based system will lead to the potential development of numerous wetlands.

Prospective wetland developers would include:

1. Counties and regional /community economic development organizations wanting to ensure they can attract business or minimize development delays.
2. Cities and towns.
3. Utilities and other large companies.
4. Farmers who currently farm many acres for the sole reason of preventing them from becoming a wetland.

During the time the UMBP is initiated, until the last credit has been used, there will be a net increase in wetland.

This UMBP will require: at minimum only two visits from the appropriate agency during the life of the program during initial and closing filing; annual review of the annual report; and management of the mitigation bank's withdrawals and additions. **The UMBPs will be in addition to the existing types of mitigation and compensatory mitigation, not a replacement for these programs.**

The minimal paperwork requirements and limited liability (as compared to existing compensatory programs) open the program to a wide variety of individuals and organizations such as: farmers, entrepreneurs, companies, and economic development organizations. The UMBP also facilitates enrollment of smaller acreage mitigation sites. The UMBP will facilitate economic development by having functional wetlands available for companies at the time they are ready to expand or locate their facilities in Indiana. This is an additional benefit that the state currently does not offer.

If utilization of a UMBP is limited to the county in which it resides, this will facilitate the potential for numerous banks. Community, county, and private economic development interests will recognize the benefits of a UMBP. This will: (1) create an atmosphere of mutual interest; (2) assist in the success of the program; and (3) minimize the cost of mitigation by having already viable and available wetlands meeting or exceeding the functions of the impaired wetlands, therefore requiring a reduce ratio.

The cost to the regulated community is substantially reduced.

This program will potentially avoid years of legal challenges and litigation. The redirection of substantial time and resources from litigation towards the constructive development of wetlands could well assure the success of a UMBP. The UMBP can likely be implemented for less than the cost of litigation.

The UMBP can free up IDEM to conduct Section 401 Water Quality Certifications as prescribed by regulation in a responsible and expedient manner, assuring protection of Indiana waters and facilitating the “wetlands permitting process.”

ATTACHMENT 3

Report of the EQSC Wetlands Statutory Workgroup

Senator Beverly Gard, Chairperson

October 21, 2002

Table of Contents

Workgroup Report

A. Introduction

B. Observations

C. Recommendations

Appendices

A. Purpose of EQSC Wetlands Statutory Authority Workgroup

B. History of Wetlands Policy Dispute in Indiana

C. Rationale for Workgroup Report and Discussion of Next Steps

D. Possible Components of a 2003 State Statute

E. Examples of Specific Wetland Properties that Could be Nominated for "Outstanding State Resource Wetland" Protective Status

F. Explanation of Common Terms

A. Introduction

The purpose of the EQSC Wetlands Statutory Authority Workgroup was to evaluate state policy options and ramifications of the options for state regulation of isolated wetlands, state regulation of federal jurisdictional wetlands, and overall state promotion on public and private lands of a coordinated wetland strategy (see Appendix A).

The workgroup met six times with open, constructive participation from workgroup members and the interested parties.

The workgroup determined that of its three charges, the question of the isolated wetland was the most pressing and one that required resolution in the next session of the General Assembly. Most of the discussion was given to that policy debate. The report has observations and recommendations largely about the isolated wetland issue. In appendices are the charge to the subcommittee, a draft of a history of the Indiana disputes, a set of thoughts that were collected and considered for continued resolution of state wetland policy, a set of ideas for a 2003 legislation, and a description of wetland categories from a policy perspective.

B. Observations of EQSC Wetlands Statutory Authority Workgroup

1. Background of Fundamental Dispute and Opportunity

IDEM has been reviewing applications for certifications under Section 401 of the Clean Water Act (Section 401) for projects that include filling federal jurisdictional wetlands according to IDEM's

interpretation of authority from the state statute and the federal Clean Water Act. At IDEM's request, the Water Pollution Control Board (WPCB) has preliminarily adopted a rule to clarify its procedures and criteria for implementing Section 401 water quality certifications.

Members of the regulated community have objected to the rulemaking at various levels ranging from objection to the type of criteria suggested to the necessity that IDEM conduct the type of certification reviews that it has done historically.

In January 2001, the U.S. Supreme Court, in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC") reduced the scope of wetlands that are federal jurisdictional wetlands. The ruling threw out reliance on the "migratory bird rule" as a rationale for wetlands that are isolated from navigational waters to be subject to federal jurisdiction. In response, IDEM established a policy indicating that current state statute defines such non-federal jurisdictional "isolated" wetlands as "waters" of the state subject to water quality discharge permit requirements and general statutory water quality protection. A lawsuit challenging IDEM's interpretation of the state statute and its authority is currently before the Indiana Supreme Court.

The 2002 General Assembly was asked to determine the state policy on isolated wetlands and, through P.L. 183-2002 (HEA 1306), it requested guidance from the EQSC. In particular, it requested the EQSC to:

- a. Consider state wetland policy in the context of other important state policies.
- b. Recommend state policy for nonfederal jurisdictional land areas with wetland characteristics and nonwetland surface water.
- d. Recommend a framework to implement the 1996 Indiana Wetland Conservation Plan.
- e. Recommend the appropriate role of mitigation banking.
- f. Consider options for a statutory definition of "private pond".

2. Isolated Wetland Policy (Non-Section 404 Wetlands; State Wetlands)

a. A state statute is appropriate to assure that wetlands not under the regulatory jurisdiction of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have appropriate protection in Indiana and both water quality and land use decisions about them are made appropriately.

b. Legal uncertainty over the government authority over isolated wetlands in Indiana is causing some to proceed to fill such wetlands without IDEM knowledge; some to request permits and being granted permits from IDEM for filling; at least one to stop development and file a lawsuit questioning IDEM's authority; and others simply to stop development on lands in question, developing instead on other locations both in and outside Indiana.

c. It is in the public interest of the state that an isolated wetland statute be adopted in the next session of the General Assembly to resolve this uncertainty.

d. Development of satisfactory long-term state policy on this land and water issue would not be possible before the next session due to federal legal uncertainty over exactly which wetlands these are and

the complexity of coming to agreement about the nature of appropriate protection.

e. The state should adopt a Phase I statute to use until a full statute is developed later with full public participation, should initiate a process to monitor implementation of the first phase of the isolated wetland policy, and should develop recommendations for a permanent policy.

f. IDEM should be given jurisdiction with statutory restrictions (under the Phase I statute), to regulate the filling of isolated wetlands and the resulting impact on the quality of waters of the state.

g. The statutory requirements in the Phase I statute should ensure that the highest quality wetlands receive the most stringent level of protection, and that these wetlands are identified through regulation on a site-by-site basis with specific property boundaries using accepted criteria.

h. Property owners should be encouraged, not punished, for restoring or allowing the restoration of wetland areas, or creation of new wetlands, on their property.

i. A general permit system for some category of state isolated wetland would reduce the burden for landowners and reduce state resources for implementation of the permit program.

j. Reasonable exclusions of some state isolated wetlands from regulation need to be included in any grant of statutory authority. These exclusions could include, for example, wetlands that form on residential lawns, wetlands on agricultural property in a federal farm program, particular categories of wetlands below a certain size, and man-made water bodies and associated fringe wetlands.

3. Federal Jurisdictional Wetland Policy (Section 404 Wetlands)

a. IDEM has long assumed authority for advising on whether a wetland should be filled under the Section 401 Water Quality Certification process because it believes that some projects may violate water quality standards. This view has strong advocates in Indiana and strong opponents in Indiana.

b. The decision of whether IDEM should continue to regulate federal jurisdictional wetlands for the purpose of filling wetlands could be determined by the General Assembly after further discussion. Indiana has the option under Section 401(a) of making or waiving water quality certifications to supplement the permit review process conducted by the Corps. Indiana could revise its current approach and fulfill its role allowed by the Clean Water Act regarding wetlands by making a certification decision on a categorical basis rather than the individual basis for many projects. The General Assembly could decide whether to allow the state to make a decision beyond an evaluation of impacts to water quality by making decisions to avoid, minimize, or mitigate wetland activities.

c. The Workgroup considered the state role in federal jurisdictional wetlands to be too complex to address in the time available. It believes such deliberation would be important before legislation is considered. Choices include a state waiver of water quality certifications; a simplified or categorical process for issuing certifications; case-by-case review and issuance of certifications by the state limited to direct impacts on water quality; comprehensive state review that may include reconsideration of issues evaluated by the Corps; or to take no action and allow the status quo to continue. These options could be implemented by either IDEM or the Indiana Department of Natural Resources (IDNR).

d. The responsibilities of IDNR in regulating wetlands should be evaluated and an ultimate program

should take advantage of current resources and expertise of IDNR as practical. IDEM is the appropriate agency to regulate the water quality requirements of the federal Clean Water Act.

e. In the Phase I statute, the legislature could establish reasonable procedural standards, including a reasonable decision-making time frame, for IDEM to make certification determinations under Section 401.

f. The EQSC should recommend a process for it to monitor implementation of the current IDEM policy for federal jurisdictional wetlands and develop recommendations for a permanent policy.

4. A Coordinated State Strategy for Wetlands on Public and Private Lands

A council representing all stakeholders should be established to assess the status of achievement of the concept of no net loss of wetlands and net gain of high quality wetlands in Indiana through a strategy of avoidance, minimizing impacts, restoration incentives and compensatory mitigations, and recommend means of improving the capacity to accomplish such wetland conservation goals.

5. Overall

a. Indiana should use the Corps' regulatory definition of wetlands as its statutory definition.

"The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."(33 CFR 328.3(b); 1984).

b. It is understood that the simultaneous three-characteristic delineation of the 1987 Corps manual is the one to implement Indiana regulatory wetland policy. The three characteristics are hydric soils, hydrophytic vegetation, and appropriate hydrology.

c. Different wetlands in different locations can have different functions. They can serve those functions well or poorly. An important state policy is to develop a credible mechanism to value and measure wetland functions.

d. An inventory is needed to determine whether isolated wetlands in Indiana are currently increasing or decreasing in acreage, number, and high quality function.

e. There is a public interest served by wetlands. The state must balance public interests and private property rights. The General Assembly is the body to make that balance.

f. Policies must be predictable and clear to those that must comply and to those monitoring compliance.

g. Implementation of wetland policies on private land must have clear procedures for appeal and dispute resolution of government determinations. Opportunities for effective administrative appeal processes are better than having the first appeal be to a court.

h. There are conflicts between state wetland policy and state drainage policy that need investigation.

6. Concluding Observation

Throughout its deliberations the Workgroup operated under several generally agreed-upon

assumptions: 1) that it is in the public interest to provide a certain degree of protection for many wetlands in Indiana; 2) that state policy should be "no net loss of wetlands;" 3) that state policy should be "net gain of high quality wetlands through minimizing impacts, restoration incentives and compensatory mitigation;" and 4) that high quality of wetland functions should be a measure of success. The time of the Workgroup expired before it was determined to the satisfaction of all that more precise language about acreage, number, and function would be appropriate and, if so, what the language would be.

C. Recommendations:

1. The General Assembly should adopt a Phase I Wetland Conservation Statute establishing authority for IDEM to regulate the filling of certain isolated wetlands according to statutorily prescribed conditions. These conditions may include:

- a. Ensuring that the highest quality wetlands receive the most stringent level of protection, and that these wetlands are designated through regulation on a site by site basis with defined boundaries.
- b. Exempting property owners from being regulated for restoring or allowing the restoration of new wetland areas, or creation of new wetlands, on their property if not used for wetland compensation for a regulatory purpose.
- c. Protecting state wetlands of quality through a program of individual permit applications for filling, with requirements for replacement of water quality functions and compensatory mitigation consistent with no net loss and net gain of high quality wetlands.
- d. Protecting other wetlands (not otherwise excluded from regulation) through a general permitting system with objective requirements, instead of an individual permitting system.
- e. Providing reasonable exclusions, including exclusions for wetlands that form on residential lawns, wetlands on agricultural property in a federal farm program, particular categories of wetlands below a certain size, certain wetlands on agricultural land not in federal farm program, and for man-made water bodies and associated fringe wetlands.

2. For federal wetlands, the General Assembly should require a reasonable time limit for IDEM to act on water quality certifications under Section 401.

3. The General Assembly should establish wetland policy direction to the state by a Phase II Wetland Conservation Statute after the EQSC completes a legislative study with deliberations for all wetlands.

STATUTORY AUTHORITY WORKGROUP APPENDICES

(The ideas in these appendices are provided for information only; this is a work in progress with ideas that could be among those used by those that follow; these ideas in and of themselves were neither accepted nor rejected by the Workgroup.)

Appendix A. Purpose of The EQSC Wetlands Statutory Authority Workgroup

The purpose of the EQSC Wetlands Statutory Authority Workgroup was to evaluate state policy options and ramifications of the options for:

a) Isolated Wetlands

Should the state regulate the filling of wetlands that are not federal jurisdictional wetlands?

What ought to be the legal description of those lands?

Is there a de minimis?

Are there exceptions due to condition or land use?

Is there a different policy for undegraded wetlands of unique type in high quality location?

What are the common examples by land use description?

Which agency ought to issue the permission for filling considering hydrological issues, habitat issues, and vegetative type?

Should individual permit applications be required for all wetland activity, or can objective standards be written into the statute to allow self-implementation?

Which agency ought to do assessment of projected water quality impact? What should be the nature of that assessment and what report should be made of the decision?

What is the process to obtain approval? If water quality is anticipated to be impacted, how will a written antidegradation protocol be developed?

b) State Role with Federal Jurisdictional Wetlands

i) Avoid, Minimize, Mitigate – Decision To Fill or Not to Fill (404)

Should the state create its own program for permits under Section 404 of the Clean Water Act (Section 404) to decide the "avoid, minimize, mitigate" issue on behalf of the Corps or as parallel determination? For all wetlands or just a subset of the wetlands? OR

Should the state formally monitor the Section 404 decisions of the federal government? and comment?

- review all applications
- review all permits
- review mitigation projects until successful

What is the necessary statutory authority/guidance and regulatory authority for which agency to do whatever is decided?

ii) Water Quality Certification (Section 401)

By federal law, the state may require a certification that the wetland filling project will not

adversely impact the quality of the surface water, or the state may waive this certification.

Should the state make this certification? Which waters are of concern for the evaluation? What should be the criteria for the state to use to certify that the water quality will not be adversely impacted? What degree of proof for what parameters?

c) State Wetland Commission

Currently, there is no single point in state government to monitor progress of the state (and federal, local, and private) programs to implement an overall wetland strategy and wetland principles in Indiana. It has been suggested that a State Wetland Commission be established. It would have no regulatory authorities. It would establish wetland principles for state policy, set a state strategy to implement the Indiana Wetland Conservation Plan, and facilitate multi-agency cooperation and monitor progress.

Many good steps are being taken by many entities for wetlands. From time to time, serious conflicts arise between wetlands policies and other important state policies. This is a place to discuss and suggest resolutions to those conflicts.

The EQSC subcommittee would decide policy options and ramifications for such a commission including duties, composition, and number of meetings. It would investigate whether existing councils/commissions could be adjusted to incorporate the function, and would make a recommendation as to the usefulness of the idea.

Duties could include:

- advise Governor and General Assembly on state wetland policy
- track wetland loss/gain by agency
- facilitate state agency coordination
- monitor progress towards strategy
- revise wetland strategy every ten years
- clearinghouse/coordination for incentives
- biennial report to General Assembly and Governor
- recommend legislation to implement wetland policy

Appendix B: History of Wetlands Policy Dispute in Indiana

The reason the EQSC has been asked to review the state wetland policy is because of a particular set of disputes about state regulatory authority over wetlands on private property.

Wetlands refers to a particular condition of the soil, water, and vegetation of land between uplands and open waters. Historically in Indiana, the state and federal governments have promoted the clearing of forests for lumber, fuel, and agriculture. Prairies were cleared for agriculture. Marshes were drained for agriculture and for disease control. This has resulted in a profound change to the water flow and habitat in Indiana. With the national conservation movement, economic and social value was recognized for forests, prairies, and marshes. Public lands were purchased from land holders for wildlife refuges for hunting and public forests for multiple uses. The advantage to the national and state flow of surface waters of wetlands

was appreciated.

In the past thirty years, the federal programs have shifted from encouraging farmers to reclaim wetlands into cropland to subsidizing farmers for restoring marginal cropland to wetlands.

The Corps was charged with implementing a federal "no net loss" policy of function and acreage of wetlands. Because the Clean Water Act gave the Corps authority over navigable waters (constitutionally acceptable because of flow between states), the Corps declared wetlands to be navigable waters. Later, the Corps came to consider its authority to extend to wetlands unconnected to navigable waters as being federally protected if the wetlands would help compliance with the Migratory Bird Treaty.

Indiana Wetland Dispute One (State/Federal Duplication Issues):

Should Wetlands Whose Filling is Regulated by the Federal Government Also Have Their Filling Be Regulated By the State?

Whenever a Section 404 wetland filling permit is requested of the Corps, the state has the option of requiring a certification that the project will comply with the state water quality standards. IDEM has so far assumed authority to require and issue these certifications because the General Assembly has given IDEM authority to implement the conditions of the Clean Water Act with approval of EPA. IDEM administers the federally-approved Indiana water quality standards. The Corps has generally been willing to incorporate the conditions IDEM requests. The Corps has both individual permits and nationwide permits for its decision to allow filling. "Nationwides" are general permits automatically granted for situations established by rule.

Controversy has arisen both because IDEM has not been specifically authorized by statute to require the optional state certification under Section 401 and because IDEM has gone beyond direct impacts to water quality in making these certifications. IDEM's certifications have included the broader issues of whether the wetland should be filled and, if so, what degree of mitigation is required. In other words, IDEM not only is addressing the question of the impact of quality of surface water (chemical, physical, biological quality) during and after the filling project, but some believe it is repeating the decision of the Corps about avoiding, minimizing, and mitigating the particular land area. For some of the Corps' nationwide permits, IDEM offers automatic Section 401 certification; for others, IDEM reviews each application individually.

This IDEM practice has been followed by most in the regulated community, but has been objected to by many others as an unauthorized, additional bureaucratic delay with a new level of unpredictability. When IDEM attempted to clarify its procedures in writing and have the WPCB promulgate a rule specifically granting this authority (avoid, minimize, mitigate) over federal jurisdictional wetlands, the regulated community objected strongly. It also objected to a parallel rulemaking simultaneously assigning an inherent normal wetland condition to itself be a "water quality standard."

IDEM's proposed rule language was written with a breadth of its coverage of the type IDNR would use when managing public lands instead of the precision and predictability necessary for establishing government enforcement powers over private lands for purpose of wetland conservation. An IDEM technical workgroup polished the proposed rule language to be internally consistent but did not address the underlying

policy dispute that the EQSC has been asked to address.

The environmental interest groups in the state have strongly supported granting IDEM the authority to decide on the filling of federal jurisdictional wetlands, arguing that the Corps does not have staff resources or sensitivity to local interests to make appropriate decisions about all of the wetland locations of public interest in the state.

This rulemaking dispute was brought to the EQSC in 1999. The EQSC first recommended the Governor establish a commission to investigate the proposed rule in the context of overall state wetland strategy. That did not happen. Then the EQSC in 2000 held a summer of wetland hearings after the Water Board Pollution Control Board held two contentious early summer hearings on draft regulations.

Those proposed rules were preliminarily adopted by the WPCB in February, 2002. P.L. 183-2002 (HEA 1306) delayed the completion of the rulemaking.

Indiana Wetland Dispute Two (Filling the SWANCC Gap):

Should Filling of Wetlands Not Under Jurisdiction of the Federal Government Be Regulated by the State?

As this rulemaking was being considered, the Supreme Court ruled in SWANCC that the grant of authority over "navigable waters" in the Clean Water Act did not extend to wetlands and other areas that are not themselves navigable and are not "adjacent" to navigable waters.

It is not clear how the federal program will proceed as a result of this decision. At least two district courts have rejected attempts by regional offices of the Corps to extend their jurisdiction to waters "hydrologically connected" to navigable waters. U.S. v. Newdunn Associates, 195 F. Supp. 2d 751, 765-69 (E.D. Va. 2002); U.S. v. Rapanos, 190 F. Supp. 2d. 1011, 1015 (E.D. Mich. 2002). Congress may try to develop another means to declare these lands under federal jurisdiction (e.g. declare that all waters are connected by ground water and can cross state lines, and therefore are under federal constitutional jurisdiction.)

At present, there is no procedure delineated by the Corps or a court for what wetland condition is or is not an isolated wetland. However, the regulation of the isolated wetlands must be by the states, to the extent each state wishes. In response, some states requested authority from their state legislatures. In Indiana, IDEM issued a written policy in April 2001 declaring that a filling of an isolated wetland is a point source discharge into a water of the state, and hence requires a pollution discharge permit. Simultaneously, IDEM crafted changes to the proposed regulatory language to create a new category of permit for filling water of the state that is an isolated wetland.

A land developer, Twin Eagles, objected that IDEM had exceeded its statutory authority, and the Marion County Superior Court agreed with this position in Twin Eagles LLC v. IDEM, No. 49F12-0107-CP-002490 (Marion Sup. Ct. Feb. 2002). IDEM has appealed the decision and the Indiana Supreme Court is now considering the case.

As IDEM appealed the Twin Eagles decision, the WPCB preliminarily adopted the regulation

expanding IDEM's authority. P.L. 183-2002 (HEA 1306) was passed by the 2002 General Assembly directing a delay in that rulemaking until the EQSC reports on basic policy issues to the General Assembly.

If the General Assembly does not act in 2003, and depending on the result of the appeal in Twin Eagles, IDEM may continue to consider filling isolated wetlands to be an act that pollutes waters of the state and requires a discharge permit from the state. Alternatively, if the General Assembly does not act in 2003, the WPCB may promulgate the regulation proposed by IDEM that it already has preliminarily adopted. Under this rule, the WPCB would create a new category of permit explicitly for the filling of waters of the state. This is written to give IDEM the authority for both federal jurisdictional wetlands and non-jurisdictional wetlands to decide whether a wetland should be filled and, if so, what degree of mitigation IDEM would require. In addition, another rule is being promulgated declaring the existing wetland condition itself to be a water quality standard, with all of the same types of protections and requirements attached to compliance with a water quality standard.

If the General Assembly does not act, the future of Indiana isolated wetlands and land development policy is likely to be decided in a random, protracted series of legal fights between IDEM and the various stakeholders.

Appendix C: Rationale for Workgroup Report and Discussion of Next Steps

a) Separate the Indiana Wetland Policy Debate into a First Phase Measure Needed in the 2003 General Assembly and Second Phase Measure Needed in the General Assembly After Two-Year Deliberation

It is necessary for the General Assembly in 2003 to create an isolated wetland statute to fill the gap created by the SWANCC decision and avoid detrimental environmental and economic impacts to the state. (Phase I Wetland Conservation Statute)

The isolated wetland statute should be an the first phase of a solution in order that all stakeholders have time to deliberate on an appropriate long-term policy.

Establish a formal process to continue policy discussions expeditiously with the rigor and constructive spirit of the EQSC workgroup debate both on the long-term isolated wetland policy and on the remaining key wetland state policy matters.

As a first phase, grant IDEM authority to regulate isolated wetlands with certain statutory conditions.

b) Possible Policy Substance of a 2003 Statute

Use Corps' regulatory definition of wetland in the Indiana statute; in policy implementation, use the Corps delineation manual idea of three simultaneous characteristics.

"The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."(33 CFR 328.3(b); 1984)

For purpose of state wetland policy, allow definition of a "pond" to continue as the dictionary definition, but clarify in statute which isolated wetlands are to be regulated and which are not. (At another time, the issue of the extent of state agency authority over "accumulations of water" can be debated and clarified by the General Assembly. A component of this is the distinction between "waters," "waters of state," and "private waters" that may or may not become the waters of the state.)

There is agreement about the usefulness of the following definitions for two perfectly mutually exclusive and perfectly complete sets of wetlands:

"Federal wetland" is a wetland that is navigable waters (or adjacent to navigable waters) under Section 404(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1344(a)

OR "that is a regulated water under Section 404....."

"Isolated wetland" is a wetland that is not navigable waters (nor adjacent to navigable waters) under Section 404(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1344(a)

OR "that is not a regulated water under Section 404....."

(The federal wetlands are covered by Section 404 for filling (Corps decision) and Section 401 for water quality (state decision or waiver); the isolated wetlands have no federal regulation.)

There is disagreement in the workgroup about the naming of each set that would be least confusing. One suggestion for "isolated wetland" was "state wetland" but others prefer to use that term for the portion of the isolated wetlands that the General Assembly authorizes a state agency to regulate. Another term suggested is "state jurisdictional" wetland, reserved for those wetlands actually to be regulated by permit from the state. An inelegant but correct terminology is Section 404 Wetland and Non-Section 404 Wetland.

Of the Indiana wetlands that are not regulated as federal jurisdictional wetlands under Section 404, Indiana statute should determine the wetland characteristics that require the state to regulate the wetland. The class to be regulated by the state and the class not to be regulated by the state each need a name. The Phase I Wetland Conservation Statute would likely not go into extensive detail about each class of regulated wetlands, but would provide statutory restrictions.

c) Categories of State Regulated Non-Section 404 Wetlands (Regulated Isolated Wetland); "State Regulated Wetland?"; "State Wetlands?"

Outstanding State Resource Wetland: undegraded example of rare and ecologically important isolated wetland; the properties' boundaries established as such by rulemaking; protection from development to the maximum extent possible; the wetland as valuable natural history museum.

This is the class considered "highest quality" in observations of the report of the Workgroup because it is determined by specific regulation and there is no de minimis. The regulation could protect the uplands that are integral to the value of the wetland. Specific categories might be included in statute. One possible list would consist of the following wetland types developed by Indiana Natural Heritage Program: wet floodplain forest, sinkhole pond, wet sand prairie, wet prairie, marl beach, acid bog, circumneutral bog, fen, forested fen, muck flat, sand flat, sedge meadow, panne, acid seep, circumneutral seep, forested swamp, shrub swamp, sinkhole swamp.

Quality Isolated Wetland: an isolated wetland in a natural, undisturbed setting. Additionally, this

category could include the specific categories of the OSRW-type wetlands that are in highly disturbed settings or are degraded beyond the criteria for OSRW protection. These would receive site-specific decisions for permits to fill. De minimis would be selected. (A suggestion was considered for a de minimis set for average wetlands with ability for citizens to petition for smaller value for specific wetlands). An individual permit would be required for filling that specifies replacement of water quality functions and compensatory mitigation consistent with no net loss and net gain of high quality wetland.

Marginal Isolated Wetland (or Lesser Quality Isolated Wetland): an isolated wetland in a human-altered, disturbed setting.

De minimis would be selected, but at higher value than for quality wetland. General permit regulatory prescription applies for procedures and responsibilities when impacting such a wetland. Compensatory mitigation may include option of payment to the state to fund project for no net loss and net gain of high quality wetland. (It was noted that a fund could be abused). IDEM or IDNR would have authority to conduct audits or compliance inspections after project completion.

d) Categories of Non-Section 404 Wetlands (Isolated Wetland) Not Regulated by State; "State-Exempt Wetland?" (situations where the public interest for wetland protection would meaningfully impair property rights)

New or Voluntary Wetlands:

These are isolated wetlands that were not present when the landowner acquired the land. They represent a "net gain" on a landowner's property. The principle is to avoid punishing landowners for causing or allowing these new wetlands to form. Expansion of previously existing wetlands would also be exempt. Conditions would include:

Landowner must be able to document that the new wetland area did not exist as wetlands at the time the property was acquired.

Exemption is eliminated if the new wetland area is used as part of a compensatory mitigation program.

(It was noted that health agencies should have the authority to issue emergency orders to take any action necessary in an isolated wetland to protect public health. This authority could be exercised, for example, if increased incidence of mosquito-borne diseases requires immediate action to spray or remove certain types of breeding grounds in particular locations. Some believed the departments had this authority to override environmental law currently; others that such explicit authority could be abused for wetland destruction. Others felt clarification of when, where, and how such authority would be exercised is important.)

Incidental Isolated Wetland:

This is a man-made water body constructed or excavated for beneficial use other than for a regulatory purpose such as wetland compensatory mitigation or state wetland easement. Examples are:

A wetland that appears unintentionally as the result of such a constructed water body, for example a fringe wetland to a man-made stock pond.

A wetland that appears on a property being managed for a dry land function such as a lawn, septic

leach field, drainage swale, or irrigated vegetation.

A wetland on farmed wetland or on a prior-converted cropland when land is used for agriculture (and other similar previous Clean Water Act exemptions).

(There should be future exclusions from this category by regulation.)

Authorize IDEM to require permits for projects filling quality state regulated wetlands or other state wetlands subject to individual permitting requirements. IDEM action would include: (1) a decision about avoiding, minimizing, and mitigating in order to assure no net loss of wetland in the state and to assure a net gain in high quality wetland in the state; and (2) a decision about the quality of the surface runoff from the filled wetland such that the water quality in the area is not impaired or degraded during or after the permitted project. The designated use and existing use of the waters of the state upstream and downstream should not be impaired. A time limit should be set for the IDEM permit decision on proposed wetland filling projects.

The following applies if the General Assembly chooses to use relevant parts of the proposed IDEM rule to implement its determination of state regulation of wetlands not regulated as federal jurisdictional wetlands under Section 404.

An advantage to using the language of the rule as a base for the statute is that the structure of the rule is comprehensive enough in its details for the Phase I Wetland Conservation Statute endorsement. It has been extensively discussed by the Workgroup, something impossible for alternative language achieving the same detail.

One key point of dispute raised by the regulated with respect to the proposed Section 401 rule is that the rule devotes most of its attention to how the agency would determine the degree to which filling is possible and the mitigation necessary. This, the regulated have argued, is the responsibility of the Corps. For the isolated wetland, that decision is exactly what the Corps no longer has authority to determine. Therefore, the structure of the proposed Section 401 rule fits the isolated wetland Phase I solution.

What parts of the proposed IDEM rule are irrelevant for the Phase I Wetland Conservation Statute to plug the SWANCC gap?

1. Applicability to federal jurisdictional waters
2. Wetland as a water quality standard

(For these federal jurisdictional wetlands, the IDEM involvement would continue as in the past until the General Assembly speaks in a year or two.)

What are the highest and most serious problems the regulated perceive about the proposed procedures as applied to isolated wetlands? If the General Assembly agrees, those few corrections could be imposed in the Phase I Wetland Conservation Statute. These might include, for example, limiting the potentially infinite array of alternative approaches that need to be identified or explored as part of a permit application; providing more objective standards for mitigation decisions; and providing a reasonable time frame (such as six months) for a final decision from the OEA in case of an appeal.

It should be affirmed that local government has authority to regulate wetlands excluded from state

regulated wetlands using regular land use law protections. No local government is precluded from regulating wetlands that the state does not regulate, provided the local government acts within its statutory powers.

Federal Jurisdictional Wetlands ideas:

The WPCB should establish by non-rule policy document by July 1, 2003, the procedures for IDEM approval of certifications under Section 401, including the scope of such certifications.

Specify a reasonable time limit for IDEM to act on water quality certifications under Section 401.

IDEM should become a signatory to the Memorandum of Understanding regarding mitigation and other matters among other agencies regarding wetlands (with Corps, IDNR, NRCS).

e) Suggested Nature of a State Wetlands Task Force/Commission/Council

Temporary Wetland Advisory Group

The EQSC should convene a two-year subcommittee to complete Statutory Authority Workgroup discussion from P.L.183-2002 (HEA 1306).

Monitor implementation of Phase I isolated wetland policy.

Recommend to the EQSC policy options for isolated wetland policy.

Review state agency role in decision to avoid/minimize and mitigate the filling of federal jurisdictional wetlands.

Advise whether statutory direction is necessary or beneficial for state regulation of federal jurisdictional wetlands.

Review the distinction between private waters and waters of state (i.e. clarify private pond definition in statute).

Monitor implementation of voluntary wetland ideas.

Recommend composition, responsibilities, staffing, and funding of a permanent state wetlands council.

Consider wetlands vis a vis dredging/drainage policies.

Permanent State Wetland Advisory Group

A. IDNR/IDEM October 1, 2002 recommendation (3 year initial life)

Report annually to Governor, General Assembly, and the EQSC.

Representative stakeholders in government and outside.

Staff by state agencies (funded by new Section 404 permit fee and/or IDNR fee).

Charge:

Guide development of a new, comprehensive wetlands inventory.

Guide development of an approach to categorize the quality, nature, and types of Indiana wetlands.

Identify and evaluate effective means to provide voluntary and other incentives for the creation and restoration of quality wetlands

in the state.

Recommend state policy and strategy for wetlands conservation and protection.

Monitor federal interpretations of the SWANCC decision and recommend long-term approach to address federal non-jurisdictional wetlands in Indiana.

Recommend appropriate strategy, rule, and policy changes or additions to implement state policy/strategy.

B. From the EQSC charge to the Statutory Authority Workgroup (new group or incorporated into Indiana Land Resources Council):

A representative council to:

- advise the Governor and General Assembly on state wetland policy
- track wetland loss/gain by agency
- facilitate state agency coordination
- monitor progress towards strategy
- revise wetland strategy every ten years
- clearinghouse/coordination for incentives
- biennial report to the Governor and General Assembly
- recommend legislation to implement wetland policy

C. From IDNR (October 1, 2002) Support IDEM/IDNR proposal (above) in addition of advisory group, in addition to utilizing any available existing IDNR Wetland Conservation Plan wetland scientists, stakeholders, and government staff to promote development and enhancement of specific wetland properties. Possibly funded by EPA grant plus IDNR match, could possibly be incorporated into Indiana Land Resources Council, operating under department of agriculture.

Appendix D: Possible Components of a 2003 State Statute

1. Phase I Isolated Wetland Protection Act

Definitions

Wetlands (Corps regulatory definition)

Isolated wetlands (wetland not in/adjacent to navigable waters)

State regulated isolated wetland

types of exclusions

New or voluntary wetland

Applicability and exclusions

- Authority of WPCB to adopt isolated wetland component of IDEM proposed rule
- Statutory restrictions and conditions
 - Outstanding state wetlands identified by site and by rule
 - Quality wetlands subject to individual permits
 - Other wetlands either exempt or subject to general permit
- 2. Procedural requirements for Section 401 certification
 - Establish authority to issue certifications regarding water quality under Section 401
 - Provide reasonable time frame for decisions
 - Request WPCB approval of a non-rule policy document for implementation by 7/1/03
- 3. EQSC ongoing study with Wetland Advisory Group
 - Long term isolated wetland policy
 - State role in federal Clean Water Act decision to avoid or minimize filling a wetland and to mitigate a filled wetland (Section 404 wetlands) vis a vis the Corps
 - Permanent wetland council to promote net gain of high quality wetlands and no net loss of wetlands in acreage

Appendix E. Examples of Specific Wetland Properties that Could be Nominated for "Outstanding State Resource Wetland" Protective Status

The workgroup discussed the idea of creating a specially protected class of wetlands that are undegraded examples of rare and ecologically important wetlands. Each would be called an Outstanding State Resource Wetland. Such properties would be identified by rulemaking with boundaries delineated that could include enough upland or buffer wetland to allow the valued functions at the rare wetland to remain high quality. There would be no wetland size too small to prevent nomination for this list. These are the wetlands of highest quality for Indiana.

The wetlands on state or federal government land currently would have the protection locked in. The wetlands on private lands may require appropriate compensation. Questions of permanent management responsibilities will need to be worked out.

These are special wetland types as defined by the Indiana Natural Heritage Program, housed within the Indiana Department of Natural Resources' Division of Nature Preserves:

WETLAND TYPE	State Rank	Current # of Occurrences
---------------------	-------------------	---------------------------------

wet floodplain forest	S3	20
sinkhole pond	S1	1
wet sand prairie	S3	14
wet prairie	S1	4
marl beach	S2	13
acid bog	S2	14
circumneutral bog	S?	15
fen	S3	65
forested fen	S1	16
muck flat	S2	14
sand flat	S1	2
sedge meadow	S1	21
panne	S1	6
acid seep	S1	7
circumneutral seep	S1	21
forested swamp	S2	25
shrub swamp	S2	37
sinkhole swamp	S1	7

The Indiana Natural Heritage Program inventories plant, animal, and natural community types in Indiana. A natural community type is classified as S1 (most imperiled) if it is know to occur in 5 locations or less. It is classified as S2 if it occurs in 6-20 locations and S3 in 21-100 locations. A rank of S? means that the type of system has yet to be ranked.

Each recorded occurrence of these wetlands is then graded as to quality with an A grade being the highest quality through B (above average quality) to C (average quality). The only time a D (lowest ranked) occurrence is in the data base is when nothing else can be found.

For all of the wetland types above, the current recorded occurrences total 288 statewide. Average acreage per occurrence is typically 10 or 20 acres. Using 20 acres per occurrence, that comes to approximately 5,760 acres statewide. Many of these occurrences are already protected on managed areas (lands owned by federal, state, local government, land trusts, etc) and therefore are already presumably protected and outside the realm of need (at least in principle) of wetland regulation in the broader sense.

Three final detail notes: dune & swale and cypress swamp do not appear in the list above because dune & swale is a topographic feature that includes several natural community types, from dry-wet sand prairie, marsh, and pond. Cypress swamp is under swamp forest. Marsh is not included in the list above because it is ranked S4 (apparently secure in the state), a rank that is perhaps arguable.

Appendix F: Explanation of Common Terms

"The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."(33 CFR 328.3(b); 1984).

PERMISSION TO FILL	CONDITIONS TO PROTECT WATER QUALITY
avoid/minimize	discharges
mitigate	not pollute
	- designated and existing use of surface water

TWO LEGAL STATUSES
FOR WETLANDS

1. Federal Jurisdictional Wetland (= in navigable waters; = a 404 wetland)	Corps 404 permit (Clean Wtr Act)	State 401 certification (Clean Wtr Act)
2. Non-Federal Jurisdictional Wetland (= isolated wetland)	State decision; to-be-decided	State decision; to-be-decided